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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 IN RE: PROTEGRITY CORPORATION
13 AND PROTEGRITY USA, INC., PATENT
14 LITIGATION
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No.: 3:15-md-02600-JD

**INFORMATICA LLC'S NOTICE OF
MOTION AND MOTION FOR
ATTORNEYS' FEES AND
EXPENSES; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
ATTORNEYS' FEES AND EXPENSES**

Date: December 15, 2016
Time: 10:00 am
Location: Courtroom 11, 19th Floor

Honorable James Donato

No.: 3:15-md-02600-JD

INFORMATICA LLC'S NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES AND EXPENSES;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES/EXPS

NOTICE OF MOTION

Defendant Informatica LLC (“Informatica”) hereby moves the Court for a finding that this case is “exceptional” under 35 U.S.C. section 285 and for an award of its reasonable attorneys’ fees and expenses.

This Motion is made pursuant to Federal Rule of Civil Procedure 54(d), Civil Local Rule 54-5, 35 U.S.C. section 285, and the Court’s inherent authority and is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities attached hereto, the Declaration of John P. Bovich, the Declaration of Paulo L. Sousa, all pleadings and paper on file in this action and such further evidence that may be submitted to the Court.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1751 (2014), the
 4 Supreme Court held that a case should be declared exceptional and attorneys' fees awarded where a
 5 litigant has taken unreasonable substantive positions or litigated a case in an unreasonable manner.
 6 When a case, like this one, separates itself from the crowd, the prevailing party is entitled to be made
 7 whole by recovering the reasonable fees and expenses related to the action. This is precisely the
 8 kind of case the Supreme Court had in mind. Protegrity Corporation ("Protegrity") pursued this
 9 action even though it was substantively devoid of merit, and its litigation conduct was unreasonable
 10 as well.

11 Indeed, Protegrity knew that the substantive claims underlying this lawsuit lacked merit by at
 12 least Fall 2014, when a number of defendants filed a series of Covered Business Method ("CBM")
 13 petitions seeking to invalidate the patents-in-suit. It was clear that Protegrity's data processing
 14 patents would not survive a subject matter eligibility challenge under 35 U.S.C. section 101 and the
 15 Supreme Court's decision in *Alice Corp. Pty, Ltd. v. CLS Bank International*, 134 S. Ct. 2347
 16 (2014), but Protegrity unreasonably continued to pursue this action anyway. In fact, aware that its
 17 patents were doomed, Protegrity attempted to redraft the claims during the CBM proceedings so they
 18 would appear more "technical" and thereby escape *Alice*. But in doing so, Protegrity proffered a
 19 claim construction of the term "database" that not only directly contradicted the intrinsic evidence,
 20 but also Protegrity's own agreed construction of that term in prior litigation. In its desperate bid to
 21 save its patents, Protegrity resorted to arguing that the construction to which it had previously agreed
 22 was now "unreasonable." Unsurprisingly, the PTAB rejected Protegrity's claim construction gambit
 23 and saw the patents for what they are: an attempt to patent the abstract concept of determining
 24 access to data based on rules. The PTAB thus invalidated the patents as ineligible under 35 U.S.C.
 25 section 101 in seven, separate Final Written Decisions.

26 In addition to the substantive lack of merit to its case, Protegrity's litigation conduct was
 27 unreasonable. Protegrity targeted Informatica LLC ("Informatica"), along with twenty-four other
 28 defendants in its litigation campaign, with the aim of exploiting the high cost of defending patent

litigation to extract settlement concessions. To attempt to maximize its leverage, Protegrity initiated suit in the District of Connecticut, a distant forum with no connection to the patents or the parties. After Informatica moved to transfer, Protegrity tried to manufacture venue by alluding to an “exclusive license” with its Connecticut-based subsidiary. Unsurprisingly, the District of Connecticut rejected this gambit as well, finding that “[t]he only evidence of the existence of an exclusive license agreement is a one-sentence declaration of Protegrity’s former CFO, and other evidence suggests that any license was not exclusive.”

The forum defects were not the only problems with Protegrity’s suit. Protegrity’s generic complaint against Informatica failed to identify an accused product and was not supported by an adequate pre-suit investigation. Tellingly, when Informatica insisted that Protegrity identify an accused product, as the law required it to do, Protegrity responded by asking Informatica to provide it with product documentation (which was publicly available). To date, Protegrity has refused to provide any evidence demonstrating that it conducted an adequate pre-suit investigation.

The Court’s discretion to award fees exists for sound reasons. *Octane Fitness* empowers the Court to find “exceptional” any case that “stands out from others with respect to the substantive strength of a party’s litigating position (concerning both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” *Octane Fitness*, 134 S. Ct. at 1756. Here, both Protegrity’s substantive positions and the manner in which it litigated its claims were unreasonable. Thus, Informatica respectfully requests that the Court award Informatica its reasonable attorneys’ fees of \$1,005,231 to date and related expenses of \$232,888, for a total amount of \$1,238,119.

II. FACTUAL BACKGROUND

A. As Part of Its Litigation Campaign Against Over Twenty Defendants, Protegrity Targets Informatica With a Generic Complaint Devoid of an Adequate Pre-Suit Investigation

Based in the Cayman Islands, Protegrity’s business is the enforcement of its patents. [See Declaration of Paulo L. Sousa (“Sousa Decl.”), Ex. U at p. 2.] To that end, Protegrity filed this lawsuit against Informatica in September 2013, alleging infringement of U.S. Patent Nos. 8,402,281 (“the ‘281 patent”) and 6,321,201 (“the ‘201 patent”) (collectively, the “patents-in-suit”).

[Declaration of John P. Bovich (“Bovich Decl.”), Ex. B.] Informatica was just one of Protegrity’s twenty-five litigation targets. [Sousa Decl., Ex. MM.] All told, Protegrity has sued or been sued by declaratory judgment complainants in approximately fifty-two lawsuits involving the patents-in-suit.¹ [*Id.*]

The generic complaint Protegrity filed against Informatica is the same one that it filed against other defendants, simply swapping out Informatica’s name for another defendant’s and relying on the same boilerplate, “on information and belief” infringement allegations it made against all. [*Compare, e.g.,* Bovich Decl., Ex. B with Sousa Decl., Ex. B.] Indeed, Protegrity did not even identify any accused product in its complaint against Informatica. [Bovich Decl., Ex. B.] And when Informatica demanded that Protegrity provide this information, Protegrity responded by asking Informatica for “user manuals, architectural diagrams, functional specifications” concerning Informatica’s products. [*See* Bovich Decl., Exs. C - D.] But the type of information Protegrity requested was publicly available, and thus Protegrity would have had access to it before it filed its complaint had it bothered to look. [Sousa Decl., Exs. NN - QQ.]

Eventually, Protegrity filed an amended complaint that identified an accused product, but even then, Protegrity refused to identify which claims of the patents-in-suit were allegedly infringed. [Bovich Decl., Ex. F and ¶ 47.] To date, despite Informatica’s requests, Protegrity has never identified a single asserted claim or disclosed any infringement theory. [*Id.*, ¶ 47.] Protegrity also has never provided any evidence confirming that it conducted a pre-suit investigation, despite Informatica’s repeated requests, including pursuant to this Court’s Settlement Conference Order (requiring an informal exchange of necessary information). [*Id.*, Ex. G and ¶¶ 50-54.]

B. Protegrity’s Bad Faith Litigation Continues With Its Efforts to Manufacture Evidence to Secure Its Desired Forum and Its Settlement Misconduct

Protegrity’s vexatious litigation conduct continued as the case progressed. Protegrity filed this suit in Connecticut, a distant and therefore expensive forum that had no relevant connection to

¹ Only three of those actions remain, pending solely to resolve the issue of recovery of defendants’ attorneys’ fees and expenses. [*See* Dkt. No. 110.]

the patents, California-based Informatica or Cayman Islands-based Protegrity. Thus, Informatica immediately moved to transfer to this District, where it is headquartered. [Sousa Decl., Ex. C.]

In opposition, Protegrity attempted to manufacture contacts with Connecticut by arguing that it had granted to its Connecticut-based subsidiary, Protegrity USA, Inc. (“Protegrity USA”), an exclusive license giving “all substantial rights” to the patents-in-suit. [See *id.*, Ex. J.] But Protegrity’s “evidence” of the alleged exclusive license – not an actual agreement, but a one-sentence declaration attesting to an agreement – was dubious, at best. [See *id.*, Ex. K.] And, the purported exclusive license created a different problem for Protegrity: if the license really existed (*i.e.*, if Protegrity USA really owned “all substantial rights” to the patents-in-suit), it meant that Protegrity had no standing to sue. [*Id.*, Exs. G and F at p. 2, fn. 1, pp. 9-10.] Thus, Informatica (1) moved to dismiss for lack of standing in Connecticut and (2) initiated a declaratory judgment action against Protegrity USA in this District. [*Id.*, Exs. G and E.] Now facing a standing defect, Protegrity changed course again, claiming that, contrary to its prior assertions, Protegrity USA did not hold “all substantial rights,” and instead actually held “less than all substantial rights” to the patents-in-suit. [*Id.*, Ex. J at p. 3.]

Meanwhile, Protegrity’s exclusive license theory unraveled in a related action in the District of Connecticut. There, the court rejected Protegrity’s alleged exclusive license, expressing skepticism of its existence and finding that, even if a license did exist, it was not exclusive. [*Id.*, Ex. K (“[T]he only evidence of the existence of an exclusive license agreement is a one-sentence declaration of Protegrity’s former CFO, and other evidence suggests that any license was not exclusive.”).] The same court thereafter granted Informatica’s motion to transfer to this Court, finding that “Connecticut’s connection is dwarfed by the Northern District of California’s critical role in this case.”² [*Id.*, Ex. H at p. 10.]

Undeterred, eight months later, Protegrity sought an end-run around the transfer order (and transfer orders in related cases) by filing a motion for MDL consolidation back to Connecticut. [*Id.*,

² After its motion to transfer was granted, Informatica withdrew its motion to dismiss for lack of standing and its declaratory judgment action, but not before it was forced to spend time and money bringing them.

Ex. R.] For the same reasons it should have never brought the cases in Connecticut, Protegrity's MDL attempt also failed, and the cases were transferred to this Court. [Dkt. No. 1.]

Protegrity's bad faith litigation tactics did not stop there. Its settlement tactics prevented any opportunity for resolution and needlessly protracted this litigation. Indeed, Protegrity improperly attempted to use this litigation to force a business deal with Informatica, even though Informatica had told Protegrity it had no interest in such an arrangement. [Bovich Decl., ¶¶ 41-42.] When the parties agreed to private mediation before the Honorable Edward Infante in January 2015 to comply with the Court's ADR requirement, Informatica's Assistant General Counsel attended the mediation with full authority to settle. [*Id.*, ¶¶ 48-49.] Before it had even started, however, Protegrity's CEO, Suni Munshani, walked out of the session because a "business person" was not attending from Informatica. [*Id.*]

C. The PTAB Invalidates the Patents-in-Suit Following Multiple CBM Reviews

As it continued to defend against Protegrity's vexatious litigation in the courts, in the Fall of 2014, Informatica filed CBM reviews of the patents-in-suit, as did Defendants Square and Aptos (f/k/a Epicor). [Sousa Decl., Exs. L - Q and S.] Those CBM proceedings ultimately ended Protegrity's district court litigation campaign. All told, the patents-in-suit have been the subject of eight CBM petitions, resulting in seven Final Written Decisions invalidating the patents-in-suit as ineligible under 35 U.S.C. section 101, among other grounds.³ [*Id.*, Exs. FF - LL.] These decisions should have come as no surprise to Protegrity. Indeed, under a straightforward application of the two-step test for patent eligibility set forth in *Alice Corp. v. CLS Bank International*, 134 S. Ct. 2347 (2014), the patents-in-suit are, on their face, directed to the abstract concept of granting access to data based on whether one or more rules are satisfied, with no inventive concept sufficient to transform that concept into a patent-eligible application.

Claim 33 of the '281 patent is representative of both patents, which share nearly identical specifications:

33. A computer-implemented data processing method comprising:

³ As for the eighth petition, the petitioner, Voltage, settled with Protegrity and thus terminated the CBM review before a Final Written Decision. [*Id.*, Ex. I.]

maintaining a database comprising a plurality of data portions, each data portion associated with a data category;
 maintaining a separate data protection table comprising, for at least one data category, one or more data processing rules associated with the data category that must each be satisfied before a data portion associated with the data category can be accessed;
 receiving a request to access a data portion associated with a first data category from a user;
 determining whether each of the one or more data processing rules associated with the requested data portion are satisfied; and
 granting the user access to the requested data portion responsive to each of the retrieved one or more data processing rules being satisfied.

The '201 patent claims add certain well-known aspects of pre-existing data processing methods, such as encryption and storing data as rows and columns in a database.⁴

The basic concept of the claims of both patents is simple and abstract. The claims recite data processing methods with three basic limitations: (1) storing data in a database; (2) storing, separately from the data, "processing rules" that control access to the data; and (3) when a user requests access to data, determining whether the processing rules allow the requested access and, if so, granting the requested access.

The following example demonstrates the claimed concept. A first database contains a person's name and credit card number. A second database contains rules that must be satisfied before the person's name or credit card number can be accessed. When a request is made for the name, the second database is consulted (*e.g.*, Rule 1: All users may access Bob's name), and the data is processed accordingly (*e.g.*, Steve may read the data). When a request is made for the credit card number, the second database is again consulted (*e.g.*, Rule 2: only Bob may access his own credit card number) and the data is processed accordingly (*e.g.*, Steve may not read the data).

Thus, as the PTAB found at *Alice* step one, the claims are "directed to the abstract idea of determining whether access to data should be granted based on whether one or more rules are satisfied." [Sousa Decl., Ex. JJ at p. 32, Ex. KK at p. 29.] And, as the PTAB found at *Alice* step two, the claims do not recite additional elements that transform the claim into a patent-eligible application of an abstract idea, because they simply recite well-known and conventional activity and

⁴ Neither patent purports to invent any type of encryption, but rather incorporates pre-existing encryption algorithms. [Sousa Decl., Ex. JJ at pp. 38-40, Ex. KK at pp. 34-35, 37.]

1 features. [*Id.*, Ex. JJ at pp. 33-40, Ex. KK at pp. 33-35.] For example, with respect to claim 33, the
 2 PTAB found that: (1) the recited computers with separate databases were well-known and
 3 conventional; (2) storing data and associated rules in separate databases is nothing more than routine
 4 data gathering; (3) receiving a request to access a data portion and determining whether the data
 5 processing rules associated with that data portion are satisfied was routine and conventional; and (4)
 6 granting access to requested data was merely a conventional post-solution activity. [*Id.*, Ex. JJ at pp.
 7 34-35.]

8 Before the PTAB reached its decisions, however, Protegrity tried to avoid invalidation under
 9 *Alice* by proffering a claim construction that contradicted both the intrinsic evidence and Protegrity's
 10 own claim construction in prior district court litigation. In the prior litigation, before *Alice* and while
 11 it was focused on infringement issues, Protegrity had agreed that the claim term "database" means
 12 "an organized collection of structured data." [*Id.*, Ex. A at p. 2.] The intrinsic evidence supports
 13 Protegrity's prior construction. The specification discloses that Figure 3 (reproduced below)
 14 "schematically illustrates a data managing system, in which the present invention is implemented
 15 and in which the following databases [PDB, ODB, A-DB, and IAM-DB] are included **for storing**
 16 **information.**" U.S. Patent No. 6,321,201 at 5:44-47 (emphasis added). The system consists of
 17 these four databases, hardware component 10, application 40, control module 20, and program
 18 module 30. *Id.* at 5:49-6:51. The specification further discloses that control module 20 "**controls**
 19 the handling of the types of data protection that the system can supply" and "carries out the
 20 **processing** requested, while program module 30 "**handles** the dialogue between the application 40
 21 involved (including ACS) and the hardware component 10." *Id.* at 6:35-43 (emphasis added). Thus,
 22 Protegrity previously agreed, and the original disclosure supports, that the databases simply store
 23 data, while the separate "modules" perform the necessary processing.

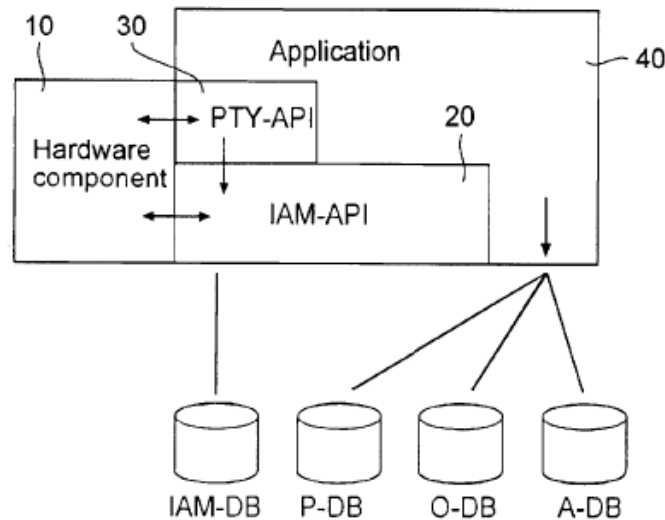


Fig. 3

Once faced with *Alice* and multiple CBM petitions, Protegrity changed its claim construction position in an effort to make the claims seem less abstract. Among other things, Protegrity argued for the first time that “database” means “a data processing system for managing an organized collection of structured data.” [See, e.g., Sousa Decl., Ex. AA at p. 16.] In other words, Protegrity argued that the database did not simply store data, but that it performed processing as well. As for the broader definition to which it had agreed in the prior litigation, in the CBM reviews Protegrity now claimed that construction was “unreasonable.” [Id., Ex. AA at pp. 20, 21 and 25.]

The PTAB rejected Protegrity’s attempt to circumvent *Alice* through its proposed construction of “database” for several reasons. First, as the PTAB found, Protegrity’s new construction directly contradicted the intrinsic evidence because the patents do not disclose that the “databases” are a “data processing system,” let alone that they “manag[e]” anything. [See, e.g., Sousa Decl., Ex. JJ at pp. 10-12.] Among other things, the PTAB observed that the claims themselves “do not recite that the database performs any other function, other than the storage of data,” and that the disclosure of the patents “does not describe the O-DB database, or any other database, as performing any other data processing or managing functions.”⁵ [Id., Ex. JJ at pp. 9-10.] Second, Protegrity’s new construction directly contradicted its own prior construction of “database.”

⁵ The PTAB also discounted the testimony of Protegrity’s witnesses because (1) it was “inconsistent with the [patents-in-suit]” and (2) the features they argued should be covered by the claims are not found in the patents. [Id., Ex. JJ at pp. 11-12.]

[*Id.*, Ex. JJ at p. 15 (PTAB construing “database” to mean “any organization of structured data,” which is “consistent with...the position taken by Patent Owner in the related district court proceeding.”).] Finally, Protegrity’s new, narrower construction was contrary to PTAB law, which requires claims to be construed under the broadest reasonable interpretation. [*Id.*, Ex. JJ at pp. 8 and 15.]

Thus, as expected, the PTAB found that both patents are directed to abstract concepts related to determining access to data based on rules and lack an inventive concept sufficient to transform that abstract idea into a patent-eligible application. [*Id.*, Exs. JJ - KK.] The PTAB’s Final Written Decisions merely confirmed what Protegrity knew or should have known by at least Fall 2014 in the wake of *Alice* and seven CBM petitions: the patents-in-suit were not patent eligible under section 101. [*Id.*, Exs. FF - LL.]

Despite that knowledge, Protegrity refused to reconsider its litigation strategy. Indeed, it was not until after the PTAB invalidated the patents-in-suit in seven PTAB Final Written Decisions, and after Informatica already spent substantial fees and expenses in both the CBM proceedings and this action, that Protegrity finally stipulated to invalidity. [Dkt. No. 103.] This Court thereafter entered judgment in Informatica’s favor, finding the patents-in-suit invalid. [Dkt. No. 106.]

III. LEGAL ANALYSIS

A. Legal Standard

In a patent case, “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.” 35 U.S.C. § 285. “[A]n ‘exceptional’ case is simply one that stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” *Octane Fitness*, 134 S. Ct. at 1756. While there is no precise rule or formula for finding a case exceptional, the Supreme Court has identified a non-exclusive list of factors a district court may consider in evaluating whether a case is exceptional, including “frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Id.* at n.6. “District courts may determine whether a case is ‘exceptional’ in the case-by-case exercise of their discretion,

1 considering the totality of the circumstances.” *Id.* at p. 1758. An “exceptional case” finding need
2 only be supported by a preponderance of the evidence. *Id.*

3 **B. Informatica is the Prevailing Party under 35 U.S.C. section 285**

4 To qualify as a prevailing party under section 285, that party must “receive at least some
5 relief on the merits” which “alters . . . the legal relationship of the parties.” *Inland Steel Co. v. Ltv*
6 *Steel Co.*, 364 F.3d 1318, 1320 (Fed. Cir. 2004). Here, Informatica is the prevailing party. The
7 PTAB invalidated all claims of the patents-in-suit, this Court issued a Judgment of Invalidity
8 invalidating all claims of the patents-in-suit and Protegrity waived all appellate rights in connection
9 with the patents-in-suit. [See Dkt. No. 106]; see also *Inland Steel*, 364 F.3d at 1319–21 (finding
10 defendant was the prevailing party in district court case under section 285 after the patent office
11 rejected the asserted claims during a reexamination proceeding).

12 **C. This Case is Exceptional Because Protegrity’s Assertion of the Patents-in-Suit was**
13 **Objectively Unreasonable**

14 This case is exceptional because the patents-in-suit are objectively invalid as ineligible under
15 section 101, and no reasonable litigant could have concluded otherwise in the post-*Alice* legal
16 landscape. Protegrity was on notice that the patents-in-suit were likely invalid under section 101 by
17 at least the Fall of 2014, when seven CBM petitions were filed in the wake of *Alice* (including those
18 by Informatica). Protegrity had a duty to reevaluate its infringement case at that time, but instead
19 chose to press on for two more years with its meritless litigation. Protegrity’s unreasonable assertion
20 of patents that are objectively ineligible on their face warrants the imposition of attorneys’ fees and
21 expenses. See *Inventor Holdings, LLC v. Bed Bath & Beyond Inc.*, No. CV 14-448-GMS, 2016 WL
22 3090633, at *3 (D. Del. May 31, 2016) (awarding attorneys’ fees from date *Alice* issued, holding
23 “regardless of whether [patentee] initially felt that it had a plausible claim, [patentee] had an
24 obligation to reevaluate its case in light of subsequent decisions [including *Alice*]”); *Edekka LLC v.*
25 *3balls.com, Inc.*, 2:15-CV-585 JRG, 2015 WL 9225038, at *3 (E.D. Tex. Dec. 17, 2015) (finding
26 case exceptional and awarding fees where “no reasonable litigant could have reasonably expected
27 success on the merits” of claim alleging infringement of ineligible patent).
28

The unreasonable claim construction Protegrity advanced during the CBM reviews further confirms the exceptionality of this case. Because Protegrity knew that the claims could never survive an *Alice* challenge if construed in accordance with the intrinsic evidence, Protegrity proffered a frivolous construction of “database” that not only contradicted its own construction of that term in prior litigation, but also contradicted the patent language. Further demonstrating the objectively unreasonable nature of its new claim construction, Protegrity inexplicably disavowed its prior construction as “unreasonable.”

The objective unreasonableness of Protegrity’s PTAB claim construction of “database” during the CBM proceedings belies any suggestion that it did not know its patents-in-suit were invalid under section 101 and confirms that this case is exceptional. *See, e.g., Garfum.com Corp. v. Reflections By Ruth d/b/a Bytephoto.com*, No. CV 14-5919 (JBS/KMW), 2016 WL 1242762, *7-8 (D.N.J. Mar. 30, 2016) (finding case exceptional and awarding fees where plaintiff attempted to add “non-conventional, non-generic limitations” “against the plain text of the patent” and where it “should have been obvious to the Plaintiff in the post-*Alice* environment” that the patent provided no inventive concept); *Source Search Techs., LLC v. Kayak Software Corp.*, No. 11-3388 (NLH/KMW), 2016 WL 1259961, at *10 (D.N.J. Mar. 31, 2016) (awarding attorneys’ fees from date of *Alice* motion in view of plaintiff’s “changing positions again in order to try and save the validity of the patent [under section 101]”); *Large Audience Display Sys., LLC v. Tennman Prods., LLC*, No. 2015-2040, 2016 WL 6123901, n.3 (Fed. Cir. Oct. 20, 2016) (unreasonable claim construction positions offered during PTAB proceedings may properly be considered in determining whether a case is exceptional).

D. This Case is Exceptional Because Protegrity Unreasonably Litigated Against Informatica

In addition to the substantive lack of merit to its case, Protegrity’s unreasonable litigation conduct also supports an exceptional case finding here. To date, Protegrity has never identified the claims it contends Informatica infringed, any infringement theory, or any evidence of a pre-suit investigation. “A patent holder, if challenged, must be prepared to demonstrate to both the court and the alleged infringer exactly why it believed before filing the claim that it had a reasonable chance of

1 proving infringement.” *Source Vagabond Sys. Ltd. v. Hydrapak, Inc.*, 753 F.3d 1291, 1302 (Fed.
 2 Cir. 2014) (quotations omitted) (holding in Rule 11 context that a declarant’s conclusory statements
 3 that a pre-suit infringement analysis had been performed was not evidence to support a reasonable
 4 belief by plaintiff that it had a meritorious infringement claim). The lack of evidence of any pre-suit
 5 investigation suggests that this lawsuit was unfounded from its inception. *See Eon-Net LP v.*
 6 *Flagstar Bancorp*, 653 F.3d 1314, 1328–29 (Fed. Cir. 2011) (affirming award of attorneys’ fees and
 7 finding no adequate pre-suit investigation where patentee’s counsel merely examined website and
 8 concluded infringement).

9 Protegrity’s improper efforts to secure its desired forum also support an exceptionality
 10 finding. Specifically, Protegrity: (1) filed suit in Connecticut even though there were no relevant
 11 contacts with that forum; (2) attempted to manufacture forum contacts, after Informatica challenged
 12 venue, by asserting a sham exclusive license that purportedly gave “all substantial rights” in favor of
 13 Protegrity USA; (3) backtracked on its assertion of the “all substantial rights” license grant after
 14 Informatica raised the standing defect this created, and re-characterized the grant as “less than all
 15 substantial rights”; and (4) after it lost the motion to transfer, moved for MDL consolidation back to
 16 Connecticut only to fail again for the very same reasons. These unreasonable tactics delayed this
 17 action by a year and a half and forced Informatica to incur unnecessary attorneys’ fees and expenses
 18 litigating these issues across three venues, including through Informatica’s (1) motion to transfer, (2)
 19 motion to dismiss for lack of standing, (3) declaratory judgment action, and (4) opposition to motion
 20 for multi-district litigation. Thus, Protegrity’s unreasonable venue tactics independently warrant an
 21 exceptional case finding. *See, e.g., Icon Health & Fitness, Inc. v. Octane Fitness, LLC*, 112 F. Supp.
 22 3d 888, 896 (D. Minn. 2015) (finding “[t]he inclusion of a peripheral party to establish venue in an
 23 inconvenient and high-cost district” to be “highly suspicious” and “more likely than not that the
 24 reason ... was to increase litigation costs.”); *Monolithic Power Sys., Inc. v. O2 Micro Int’l Ltd.*, 726
 25 F.3d 1359, 1367 (Fed. Cir. 2013) (affirming exceptional designation and fee award where, *inter alia*,
 26 party made misrepresentations and filed baseless motions); *Kellogg v. Nike, Inc.*, 2009 WL 3165529,
 27 at *12 (D. Neb. Sept. 30, 2009) (“inten[tion] to delay the proceedings, obfuscate the issues and
 28 increase [...] litigation costs” justified award of attorneys’ fees); *Computer Docking Station Corp. v.*

1 *Dell, Inc.*, 519 F.3d 1366, 1379 (Fed. Cir. 2008) (“If the patentee prolongs litigation in bad faith, an
2 exceptional finding may be warranted.”).

3 Protegrity’s unreasonable settlement tactics likewise support an exceptional case finding.
4 Protegrity improperly attempted to leverage its litigation into a business deal with Informatica. But
5 Informatica was never interested in a “business deal” with Protegrity and thus had no choice but to
6 litigate. And, when Informatica prepared and came to the Court-ordered private mediation with full
7 authority to settle, Protegrity improperly walked out before the mediation even started because a
8 “business person” from Informatica did not attend. Such tactics demonstrate that Protegrity’s
9 motivation in continuing this litigation had little to do with the merits of the case. *Octane Fitness*,
10 134 S. Ct. at 1756 n.6 (“in determining whether to award fees . . . district courts [may] consider . . .
11 ‘frivolousness, motivation, objective unreasonableness (both in the factual and legal components of
12 the case) and the need in particular circumstances to advance considerations of compensation and
13 deterrence.’”).

14 **E. Informatica Should Be Awarded Its Reasonable Fees and Expenses**

15 The Federal Circuit “interpret[s] attorney fees [recoverable under section 285] to include
16 those sums that the prevailing party incurs in the preparation for and performance of legal services
17 *related to the suit.*” *Cent. Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1578 (Fed. Cir. 1983)
18 (emphasis added); *see also Nikko Materials USA, Inc. v. R.E. Serv. Co.*, No. 03-2549 SBA, 2006 WL
19 118438, *5 (N.D. Cal. Jan. 13, 2006) (“an award of all reasonable and necessary expenses related to
20 the litigation is properly within the scope of 35 U.S.C. § 285”). Thus, in addition to amounts
21 incurred for district court patent litigation, fees and expenses related to CBM reviews are
22 recoverable under section 285, particularly where, as here, they obviate the need for the district court
23 to address invalidity. *See, e.g., Deep Sky Software, Inc. v. Southwest Airlines Co.*, No. 10-cv-1234-
24 CAB (KSC), 2015 WL 10844231, *2 (S.D. Cal. Aug. 19, 2015) (awarding fees under section 285 for
25 *inter partes* reexamination); *IA Labs CA v. Nintendo Co.*, No. CIV. PJM 10-833, 2012 WL 1565296,
26 *4 (D. Md. May 1, 2012) (awarding attorneys’ fees related to reexamination proceedings); *PPG*
27 *Indus., Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1569 (Fed. Cir. 1988) (fees
28

1 awarded for reissue proceeding because reissue “substituted for the district court litigation on all
2 issues considered by the PTO and the Board”).

3 The methodology for assessing a reasonable award under section 285 is within the court’s
4 discretion. *See Automated Business Co., Inc. v. NEC America, Inc.*, 202 F.3d 1353, 1355 (Fed. Cir.
5 2000). The Ninth Circuit has identified the following factors which may be considered: (1) the time
6 and labor required, (2) novelty and difficulty of the questions involved, (3) the skill required to
7 perform the legal service properly, (4) the preclusion of other employment by the attorney due to
8 acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time
9 limitations imposed by the client or the circumstances, (8) the amount involved and the results
10 obtained, (9) the experience, reputation, and ability of the attorneys, (10) the “undesirability” of the
11 case, (11) the nature and length of the professional relationship with the client, and (12) awards in
12 similar cases. *Nikko*, 2006 WL 118438 at * 6 (citing *Kerr v. Screen Extras build, Inc.*, 536 F.2d 67,
13 70 (9th Cir. 1975)).

14 Applying these factors here demonstrates that the award Informatica seeks is reasonable.
15 Informatica seeks fees and expenses totaling \$1,238,119, including \$445,436 in attorneys’ fees and
16 \$29,838 in expenses related to Protegrity’s district court litigation against Informatica, and \$559,795
17 in attorneys’ fees and \$203,049 in expenses related to the CBM proceedings.⁶ [Bovich Decl., ¶¶ 3-
18 38.] As set forth in the declaration of John P. Bovich, the fees and expenses Infomatica seeks were
19 reasonably and necessarily incurred, and the amounts are reasonable under the lodestar approach.⁷

20 ⁶ The CBM fees also are reasonable and should be awarded because Protegrity’s conduct increased the fees incurred. For
21 example, Protegrity failed to follow the PTAB’s rules in connection with the following CBM filings: (1) Motion to
22 Amend in the ‘281 CBM review [Sousa Decl., Ex. BB], (2) Observation on Cross-Examination of Reply Witness in both
23 CBMs [*Id.*, Exs. JJ and KK], and (3) Preliminary Response in the ‘281 CBM. [*Id.*, Ex. T.] In each of those instances,
24 the PTAB found that Protegrity had not abided by the CBM rules. [*Id.*, Ex. V.] Protegrity further increased CBM fees
by (1) protracting expert depositions with questions unrelated to the CBMs [*Id.*, Ex. Z], (2) forcing Informatica to
defend against ‘281 patent claims it then voluntarily cancelled [*Id.*, Ex. BB], and (3) a failed attempt at substituting those
claims with new claims. [*Id.*]

25 ⁷ Informatica’s expert expenses related to the CBMs (included in the \$203,049) are recoverable under this Court’s
26 inherent authority due to Protegrity’s bad faith litigation tactics described above. *See, e.g., Takeda Chemical Industries,*
27 *Ltd. v. Mylan Laboratories, Inc.*, 549 F.3d 1381, 1390-91 (Fed. Cir. 2008) (affirming award of expert fees under inherent
28 authority because of “appellant’s bad faith and vexatious litigation conduct”); *MarcTec, LLC v. Johnson & Johnson*, 664
F.3d 907, 921 (Fed. Cir. 2012) (affirming award of expert fees under inherent authority because “there was bad faith,
such as the filing of a frivolous action”).

[*Id.*, ¶¶ 5-24 and 39-59]; *see also City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S. Ct. 2638, 120 L.Ed.2d 449 (1992) (confirming strong presumption that the lodestar represents the reasonable fee). The Reed Smith attorneys who represented Informatica in this matter are experienced patent litigators, and the rates Reed Smith charged are comparable to those charged by peer law firms and reasonable. [Bovich Decl., ¶¶ 9-19]; *see also Kilopass Tech., Inc. v. Sidense Corp.*, 82 F. Supp. 3d 1154, 1171 (N.D. Cal. 2015) (finding \$750-830 hourly rates for senior litigation partner reasonable).

Similar and even greater awards issued by courts under section 285 further confirm the reasonableness of Informatica’s requested award here. *See Takeda Chemical Industries*, 549 F.3d at 1385, 1390-91 (Fed. Cir. 2008) (affirming \$16,800,000 fee and expense award); *Apotex, Inc. v. UCB*, No. 0:12-cv-60706, 2015 U.S. Dist. LEXIS 176573, *7 (S.D. Fl. Dec. 4, 2015) (finding case exceptional and awarding \$5,336,391 in attorneys’ fees and expenses); *Segan LLC v. Zynga Inc.*, 131 F.Supp.3d 956, 963 (N.D. Cal. 2015) (finding case exceptional and awarding \$1,188,773 in fees where plaintiff’s litigation positions and theories were untenable from outset of case); *Joao Bock Transaction Sys., LLC v. Jack Henry & Assocs., Inc.*, No. 12-1138-SLR, 2016 U.S. Dist. LEXIS 43252, at *11 (D. Del. Mar. 13, 2016) (awarding attorneys’ fees of \$1,000,000 under section 285). Moreover, Informatica’s requested award is well below the median cost of defending similar patent litigation, as documented in the American Intellectual Property Association’s (“AIPLA”) 2013 Report. [Bovich Decl., Ex. H (median cost of litigating a patent infringement suit in San Francisco in 2013 with \$1-\$25 million at risk was \$3.583 million inclusive of all fees and expenses).].

Finally, should Informatica incur further attorneys’ fees or expenses litigating this motion, those fees and expenses should be added to the final award. *Mathis v. Spears*, 857 F.2d 749, 756 (Fed.Cir. 1988). Post-judgment interest also should be awarded pursuant to 28 U.S.C. section 1961. *Id.*

IV. CONCLUSION

Protegrity forced Informatica to expend significant fees and costs in defending against this meritless action. Because Protegrity’s substantive positions and litigation conduct were unreasonable, this case should be declared exceptional and Informatica should be awarded its attorneys’ fees and expenses.

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Dated: October 26, 2016

REED SMITH LLP

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Informatica Corporation

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2016 a true and correct copy of the foregoing document was filed and served electronically by this Court's CM/ECF system on all parties of record.

By: /s/ Paulo L. Sousa
Paulo L. Sousa

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